No. 18,905

United States Court of Appeals
for the Ninth Circuit

KANSAS CITY FIRE AND MARINE INSURANCE COMPANY, a corporation,

Appellant,

vs.

WAYNE A. CLARK, THE MONTANA POWER COMPANY, a corporation, LEW CHEVROLET COMPANY, a corporation, and CLARENCE G. MADSEN,

Appellees.

Brief of Appellees

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Appellees do not agree that either the statement of the case by appellant, or its statement of the issue, are adequate. We agree with the statement concerning jurisdiction.

DESCRIPTION OF RECORD REFERENCES

The transcript of record is in two volumes which will be referred to as T1 and T2. The findings of fact are located in *T1, pages 59-68*. They are supplemented *(T1, P. 68, l. 4-7)* by the facts in the opinion by the District Court, and the opinion is in *(T1, Pp. 42-56)*. Documentary exhibits were all offered and received in evidence without objection as set forth in the pre-trial order *(T1, Pp. 21-23)*, confirmed on the date of trial *(T2, Pp. 3-5)*. Plaintiff's Exhibits 2 through 7 inclusive, described in the pre-trial order, appear verbatim in the record as Exhibits A through F *(T1, Pp. 29-39)*. When referred to hereafter, their page location in the record will be listed.

ISSUE

Appellant as plaintiff in a declaratory judgment action denied coverage to appellees under appellant's insurance policy under which appellees claim coverage for damage claims arising out of the crash of an airplane on July 26, 1960, while it was piloted by appellee Wayne Clark.

The trial judge found as fact *(T1, Pp. 59-68)*, that one Al Forhart was a properly certificated instructor pilot; that his business included student pilot instruction, part of which was the instruction of pilots who had a private license, and who were qualifying for, or upgrading to a commercial license; that appellee Clark was

the holder of a private pilot's license; that Clark was taking instruction from Forhart to upgrade his private license, which already allowed him to fly with passengers so long as it was not for hire; that as part of his instruction, the F.A.A. considered it important that he have experience in flying solo with a plane load of passengers; that prior to July 26, 1960, appellant had negotiated with and sold to Forhart a policy of liability insurance that included an "omnibus clause" which defined as an insured any person while using the aircraft, and any person or organization legally responsible for its use, providing the actual use was with permission of Forhart; that on July 26, 1960, appellee Clark was piloting Forhart's plane, carrying passengers, when it crashed at Red Lodge, Montana; that at the time Clark was taking instruction from, and was under the direct supervision and control of Forhart; that it was intended by the contract of insurance issued by appellant to Forhart that student pilots such as appellee Clark would be "insureds" as defined by the "omnibus clause"; that:

> "10. Clark was a pilot contemplated and authorized by Item 7 of the Declarations as set forth in Part A of Endorsement No. 3, and the use he was making of the aircraft was one contemplated by Item 6 of the Declarations. In other words, at the time of the crash, the aircraft was being used for purposes of 'student instruction' and was being flown by Clark as a 'student pilot under direct supervision and control of a properly certificated instructor pilot' as those terms were used in the policy of insurance. At the time of the crash, the plane was not being used

for purposes of 'business and pleasure' as that phrase is used in Part B of Endorsement No. 3 of the policy of insurance. Clark was using the aircraft with the permission of the Named Insured, within the meaning of the omnibus insured clause in the Insuring Agreements contained in the policy, and he was not operating the aircraft under the terms of any rental agreement or training program which provided any remuneration to the Named Insured for the use of said aircraft within the meaning of subparagraph (d) of the omnibus insured clause (Insuring Agreement III).

"11. From the policy, the preliminary negotiations, as shown by the exhibits, and the fact that defendant, Clark, was making use of the aircraft as a student under the direct supervision and control of Forhart in upgrading a private license, it appears that Clark while operating the plane and any person or organization legally responsible for his use, were within the terms and intent of the policy as written."
(T1, Pp. 65-66.)

Is there ample, competent, substantial evidence in the record, worthy of belief, to support the findings of fact by the District Judge? This Court has held consistently that where the facts found are rational and reasonable, the acceptance or rejection of testimony by a trial judge is binding upon the appellate court, and will not be disturbed by the appellate court. The findings of fact by the trial judge will not be set aside unless they are so inherently improbable that they are not worthy of belief.

Distillers Distributing Corporation v. J. C. Millet Co., 9th C.C., 1962-63, 310 F. 2d 162;

Russell v. Texas Company, 1956-1957, 9th C.C. 238 F. 2d 636;

Fegles Const. Co. v. McLaughlin Const. Co., 9th C.C., 1953, 205 F. 2d 637.

In this case, the findings by the trial judge are rational and reasonable, and are supported by ample evidence worthy of belief.

SUMMARY OF EVIDENCE

a. Preliminary Negotiations with Lynch.

Al Forhart had an Airman Certificate which licensed him for Commercial flying, and as an Instructor *(Pl. Ex. 6, T1, P. 33)*. In March, 1960, appellant negotiated with Forhart through its agent, Lynch, and sold to Forhart its policy of insurance *(Pl. Ex. 1)*. Lynch was a licensed solicitor for appellant *(T2, P. 7)*. Forhart explained to Lynch that he would be engaged in student training as well as a charter business *(T2, P. 12, l. 23-25)*. Lynch knew that the student instruction phase of Forhart's business included the instruction of private pilots qualifying for a commercial ticket *(T2, P. 16, l. 1-3)*, and that Forhart was qualified to give such instruction *(T2, P. 19, l. 20-26; P. 20, l. 1-3)*. Forhart requested from Lynch a type of coverage that would be fitting and proper for business aviation *(T2, P. 12, l. 20-22)*. Lynch outlined to Forhart the normal liability coverage carried by flight operators *(T2, P. 11, l. 22-25)*. On March 28, 1960, Lynch furnished appellant's printed

application form and assisted Forhart in completing it. Forhart filled in in pen and ink his pilot qualifications. Everything inserted in the application form by typewriter was inserted by Lynch *(T2, P. 8; P. 20, l. 4-14; Pl. Ex. 6, T1, Pp. 33-35)*. Lynch filled in and applied only for the type of coverage that Forhart wanted *(T2, P. 20, l. 12-17)*.

On that same day, March 28, 1960, Lynch sent to appellant the wire requesting that it bind and quote on the coverage desired *(Pl. Ex. 2; T1, P. 29)*. The wire specified coverage for "Commercial Including Instruction Use." On March 29, appellant, by wire, refused to quote and denied writing coverage for *Commercial Operators (Pl. Ex. 3; T1, P. 30;* emphasis supplied). On March 31, Lynch wired appellant again, indicating he had air mailed the application on March 29, and that Forhart had:

> "Purchased 1960 Model 172, Cessna, for Dual purpose of *Preferred Class Student Instruction* And Limited Air Taxi Work * * *." *(Pl. Ex. 4, T1, P. 31;* emphasis supplied.)

Appellant replied on the same date, March 31, 1960, it had insufficient information to quote *(Pl. Ex. 5, T1, P. 32)*. After receiving the application, appellant on April 4, 1960, wired:

> " * * * Coverage bound 4-3-60 BI/PD And Hull Per Application Passenger 50,000 Also BI/PD Only On N37261 Uses *Charter Instruction No Rental.*" *(Pl. Ex. 7; T1, P. 36;* emphasis supplied.)

Appellant's solicitor, Lynch, testified the application had included all the coverages Forhart had asked for, and only the coverage he asked for *(T2, P. 10, l. 3-9)*; that after the quote came back, Forhart said he wanted full coverage except for rentals *(T2, P. 16, l. 18-20)*; that the only coverage applied for that was later eliminated was coverage for rentals:

"Q. But other than the rental flying, the application included everything he wanted and everything you planned to give him, is that right?

A. Yes." *(T2, P. 21, l. 1-6)*.

The printed form was appellant's own form; the typewritten inserts were by appellant's solicitor, Lynch; and inserted in the application by Lynch was a specific statement that coverage was desired "while aircraft being operated by student pilots". The only restriction as to identity of pilot for coverage purposes was the restriction that Al Forhart only could pilot the aircraft while it was being used for an air taxi. By its wire, plaintiff's exhibit 7, appellant bound itself to coverage "per application". Furthermore, plaintiff's exhibits 1 through 7 were prepared by appellant, produced and offered in evidence by appellant, and received without objection.

b. The Policy.

What does the policy *(Pl. Ex. 1)* provide? Repeated reading by legally trained minds simply compounds confusion upon confusion. Item 6 of the Declarations of the policy defines the purposes for which the aircraft may be used. It contains six different uses with

a box for checking off the uses authorized. Everything is printed except the x's in the boxes which are typewritten, and except that in (f) the words "Student Instruction" were typed in.

> "Item 6. The aircraft will be used only for the purposes indicated by 'x'.
>
> X(d) 'Commercial Ex Instruction'. The term 'Commercial Ex Instruction' is defined as including all of the uses under (a) and (b) above and use of the aircraft for the transportation of passengers and or freight for hire but excluding any use of the aircraft for instruction or rental to others;".

Since the box (d) "Commercial Ex Instruction" includes the uses provided in boxes (a) and (b) of Item 6, those boxes provide:

> "(a) 'Pleasure and business.' The term 'Pleasure and Business' is defined as Personal and Pleasure use and use in direct connection with the Insured's business, excluding any operation for which a charge is made and excluding any operation of the aircraft by a student pilot;"

(This varies from the application which added: "Is coverage desired while aircraft being operated by Student Pilots? [X] Yes."; the typewritten x having been inserted by Lynch.)

> "(b) 'Industrial Aid.' The term 'Industrial Aid' is defined as including the uses enumerated in the definition of 'Pleasure and Business' and also includes transportation of executives, employees, guests and customers, excluding any operation for which a charge is made;"

A typewritten X is likewise inserted in box (f) of Item 6. It provides:

> "X(f) 'Special Uses.' The term 'Special Uses' is defined as STUDENT INSTRUCTION."

NOTE that the words "Student Instruction" signifying special uses permitted, were typewritten by appellant who prepared this document. If so intended, how easy it would have been to insert at this point: "The term 'the Insured' does not include Student Pilots, and Student Pilots are not covered by this policy." *NOTE ALSO:* There is no definition in this policy of "student", or "student pilot", or "student instruction", and no restrictions or limitations as to identity of student pilots in either application or policy.

Exclusion 2 of the Exclusions pleaded and relied upon by appellant is significant. It provides as follows:

> *"This policy* does not apply: * * *
>
> "2. to *any occurrence or to any loss or damage* occurring while the aircraft is operated, while in flight, by other than the pilot or pilots set forth under Item 7 of the Declarations." (Emphasis supplied)

If Wayne Clark as pilot, and his use of the aircraft at the time of the loss, were not within the contemplation of Item 7, no loss or damage resulting including Hull damage was covered by the policy. Item 7 of the Declarations, referred to in Exclusion 2, provides:

> "Item 7.

SEE ENDORSEMENT NUMBER 3
(Typewritten)

(Printed)
only will operate the aircraft while 'in flight' and while holding proper certificate(s) as required by the Civil Aeronautics Authority."

Turning to Endorsement Number 3, it provides:

"GENERAL ENDORSEMENT (Printed)

(Typewritten)
"IN CONSIDERATION OF THE PREMIUM AT WHICH THE UNDERMENTIONED POLICY IS WRITTEN IT IS HEREBY UNDERSTOOD AND AGREED THAT IN THE SPACE PROVIDED IN ITEM NO. 7 OF THE UNDERMENTIONED POLICY DECLARATIONS THE FOLLOWING SHALL BE INSERTED:

"A. WHILE THE AIRCRAFT IS BEING USED FOR PURPOSES OF STUDENT INSTRUCTION:

STUDENT PILOTS WHILE UNDER THE DIRECT SUPERVISION AND CONTROL OF A PROPERLY CERTIFICATED INSTRUCTOR PILOT.

"B. WHILE THE AIRCRAFT IS BEING USED FOR PURPOSES OF BUSINESS AND PLEASURE AND TRANSPORTATION OF PASSENGERS FOR HIRE:

AL FORHART

(Printed)
"Nothing herein contained shall vary, alter, waive or extend any of the terms, representations, conditions or agreements of the Policy other than as above stated.

"To be attached to and form a part of Policy No. AC6611 issued to AL FORHART FLYING SERVICE

by KANSAS CITY FIRE & MARINE INSURANCE COMPANY

s/ Morton T. Jones
President

"This endorsement effective April 3, 1960.

Authorized Representative

Endorsement No. 3"

(In addition to the portion designated as typed, the inserts "AC 6611"; "Al Forhart Flying Service"; "April 3, 1960", were all typewritten. Once again, if it was so intended, how easy it would have been to insert at this point: "The term 'the Insured' does not include Student Pilots, and Student Pilots are not covered by this policy.")

Appellant by its conduct has interpreted the intent of the contract to mean that the foregoing Exclusion 2 does not exclude coverage in this case, and that Wayne Clark was a pilot within the contemplation of Item 7, by accepting coverage for the hull damage, by paying it, by accepting coverage for Al Forhart, and by dismissing him from this lawsuit with prejudice *(Def. Ex. 9)*. As indicated by Exclusion 2, there was no coverage whatsoever for any such loss or damage unless Clark was a pilot within the contemplation of Item 7. (Appellant

attempts to confuse this evidence of its own interpretation of the contract with waiver *(App. Br., Pp. 26-27).*)

Paragraph III of the Insuring Agreements of the policy, an omnibus clause, provides:

> "III. Definition of Insured.
>
> "The unqualified word 'insured" whenever used in this policy with respect to Coverages A, B, C, and D, includes not only the named insured but also any person while using or riding in the aircraft and any person or organization legally responsible for its use, provided the actual use is with the permission of the named insured.
>
> "The provisions of this paragraph do not apply:
>
> " * * * (d) to any person operating the aircraft under the terms of any rental agreement or training program which provides any remuneration to the named insured for the use of said aircraft."

NOTE: There is no definition in application or policy of the term "training program"; nor in any dictionary; nor in "Words & Phrases."

If it had been intended that the only person contemplated by the term "the Insured" was Al Forhart, such could have been stated in plain, simple, unmistakable, unambiguous language:

> "The only person included in the term 'the Insured' is Al Forhart."

If it had been intended that student pilots were not included in the term "the Insured", such could have been stated in plain, simple, unmistakable, unambiguous language:

"The term 'the Insured' does not include student pilots. Student pilots are not covered by this policy.

If it had been intended that the words "training program" would include individual or any student instruction, it could have been simply stated:

"The words 'training program' include any form of student instruction."; or

"Students receiving any form of student instruction are to be considered engaged in a training program."

The language of application and policy, as well as conduct of appellant, indicate an entirely different intention.

Paragraph 5 of the Conditions contemplates more than one insured:

"Severability of Interests — Coverages A, B, C, and D — The term 'the Insured' is used severally and not collectively, but the inclusion herein of more than one insured shall not operate to increase the limits of the Company's liability."

c. Testimony and Other Evidence.

Evidence from Clark and Lynch is significant. On February 15, 1961, appellant procured a written statement from Clark *(Def. Ex. 8)*, developed by appellant through request for admission of February 25, 1963; admitted in evidence without objection *(T1, P. 22; T2, P. 3)*. Answers of Clark to requests of appellant for admissions of fact were also offered and received in evidence without objection *(T1, Pp. 22, 24, 39; T2, Pp. 3-4)*. It appears that Clark had a private license which authorized him to fly and carry passengers. He had paid Forhart

$1500 for instruction leading to qualifying for a commercial license, which contemplated some hours of dual time flying with Forhart, and many hours of solo time flying without Forhart, some of which Clark had done prior to July 26, 1960, and in the aircraft involved in the accident *(T1, P. 39; Def. Ex. 8)*. Prior to July 26, 1960, Clark had flown that plane solo cross-country carrying passengers while upgrading his license *(T2, Pp. 28-29)*.

The only evidence in this record concerning the meaning of the words "training program" is in the answer of Clark to the request for admissions:

> "I was never engaged in any 'training program' with Al Forhart, and there never was any 'training program' with him, as I understand the words 'training program' to mean." *(T1, P. 39, l. 14-16)*

Appellant failed to produce any other evidence by way of explanation, contradiction, correction, or otherwise from Forhart, Lynch, or anyone else.

On July 26, 1960, Clark had received a call from Mountain Chevrolet of Red Lodge to travel to Red Lodge to look into a proposed sale *(T2, P. 27)*. At first he was going to drive to Red Lodge, and he could have driven down and back in about the same time as flying. But he was anxious to build up flight time, and decided to fly. He asked Clarence Madsen to go along. He checked out with Al Forhart who gave him the routine instructions, advised him to watch the temperature and its effect on the air density, told him about the Red Lodge airport *(Def. Ex. 8)*.

Observed by the trial judge as to manner, appearance, and the like, Clark testified:

a. "Q. Were you acquainted with the air density prior to taking off that day?

A. Yes." *(T2, P. 30, l. 9-11)*

b. "Q. Had you ever received any instruction from your instructor either verbally or in flight for taking an aircraft off with this load under the weather conditions and air density that were evident at that time?

A. When I called Mr. Forhart to get permission to use the plane there was a little discussion like it says in the statement about that."

(T2, P. 31, l. 21-25)

Clark's statement said in part:

> "I checked out with Al Forhart and he gave me the routine instructions and advised me to watch the temperature and its effect on the air density and also told me about the Red Lodge airport. He gave me general information and instruction before I took off. While I was going to try to make a sale in Red Lodge at the time, my reason for flying was to build up time towards my commercial license. As far as I was concerned, I was a student under Al Forhart's instruction. On Tuesday, July 26, 1960, when I flew to Red Lodge, the business aspect of the trip was incidental. I was also a student under instruction on the flight from Red Lodge which ended in an accident. Under the instruction procedure for a commercial license, some of the training is under dual instruction, while the rest is solo, under the direction of the instructor. The flight to and from Red Lodge would be flight time under the direction of the instructor, Al Forhart. At that time I was a student pilot under instruction. Under solo flight

training mentioned above by saying that the solo flight training was under the direction of the instructor, I mean that the instructor gave instructions and direction before the take-off." *(Def. Ex. 8)*

NOTE: Appellant suggests the District Court should have disbelieved this evidence, and have found to the contrary, but cannot refer to any contrary evidence *(App. Br., P. 26)*. There is no contradiction or dispute in this record whatsoever by Al Forhart, or by appellant's soliciting agent Lynch, or by anyone else, with respect to the foregoing evidence from Clark. There is the corroborating testimony from appellant's licensed solicitor, Lynch.

Lynch, appellant's soliciting agent, described what was required to get a commercial license, which included 200 solo hours, the dual involved in the requirement for the pilot license, and some instrument training. It also required a certain amount of cross-country time in the vicinity of 40 hours *(T2, P. 18)*. He then testified:

"Q. Now a private pilot has the right to carry passengers, does he not?

A. That is right.

Q. But not for hire?

A. That is right.

Q. Now the aircraft performs differently when it has a passenger in it than when it is just flown by the pilot alone with no other occupant?

A. Yes, the performance would vary directly to the weight.

Q. And it is important in order to obtain a commercial license that the pilot experience carrying a full load of passengers, isn't it?

A. Yes, the F.A.A. recommends that under the supervision of the instructor that that ability be established.

Q. And it is generally considered in the industry that when a pilot obtains permission from his instructor to fly solo that he is under the supervision of the instructor when he gets permission to take the aircraft alone, isn't that right?

A. That is right." *(T2, P. 18, l. 12-26; P. 19, l. 1-6)*

Note: Appellant quotes only part of this testimony of Lynch and objects because the District Court considered and believed all of it along with Clark's corroborating evidence *(App. Br., Pp. 24-25)*.

Lynch also testified that the cross-country flying involved traveling cross-country from one airport to another regardless of how short the trip might be *(T2, P. 21, l. 10-17)*. There is no contradiction nor dispute in this record whatsoever of the foregoing evidence from appellant's agent Lynch.

While Clark was on the stand as a witness, appellant produced and had him examine the F.A.A. report of the accident *(T2, P. 29)*. Appellant did not put the report in evidence. It is not unfair to suggest and infer that there were no flight violations that would affect coverage, or appellant would have so contended and so proved.

d. Summary.

Considered in the light of Montana law, the foregoing evidence in the record, worthy of belief, is ample, competent, substantial support for the findings of fact by the District Judge. Under such evidence, the findings and conclusions are rational and reasonable.

The trial court found as fact that under a reasonable construction of the contract as written, Clark and his employer were and are omnibus insureds. When we consider in addition the interpretation of the contract by appellant through its conduct, the intention of the parties gleaned from the negotiations, application, and telegrams, and the morass of ambiguous fine print clauses which not only conflict between themselves, but which contradict and conflict with the typewritten inserts, all of which were inserted by appellant and which do not negative such intent, the evidence is overwhelming.

If the Court deems it necessary, in order to give expression to that intent, for the Court to reform the contract to more clearly express the intent, or to estop appellant from denying that intent, the Court can resort to the additional evidence.

Peerless Casualty Co. v. Mountain States Mutual Casualty Co., Mont. 9th C.C., 283 F. 2d 268.

ARGUMENT

A. *MONTANA LAW.*

In Montana, contracts of insurance should be given a fair and reasonable construction such as intelligent businessmen would give them, rather than a strict or

technical construction such as a skilled insurance lawyer or executive might give. A cardinal principle requires that the contract of insurance be construed liberally in favor of the insured and against the insurer. Whenever a contract is so drawn as to be uncertain, or ambiguous and to require construction, and the contract is fairly susceptible of two constructions, the one favorable to the insured will be adopted. The policy holder must be protected against conflicting, confusing and ambiguous statements in policies. If it is intended to exclude persons or uses from coverage, such must be done expressly in plain, simple, and unambiguous language.

In Montana, the whole of a contract must be taken together, so as to give effect to every part if reasonably practical, each clause helping to interpret the other, and a party cannot single out isolated words, or phrases, or paragraphs, without regard to the remaining language of the contract. Furthermore, the written parts of a contract control the printed parts. When the parties to a contract of doubtful, or ambiguous meaning have placed a particular interpretation upon it, that interpretation is one of the best indications of their true intent.

On the other hand, courts must give effect to express language which clearly and plainly reflects the intention of the parties. Courts cannot change a contract clearly expressed.

1. In Montana, effect must be given to every part

of the contract so that the whole is taken together, and each clause is used to interpret the other.

13-707, R.C.M. 1947.

2. Written parts of a contract control over the printed parts.

13-717, R.C.M. 1947.

3. In *Musselshell Valley F. & L. Company v. Cooley, 86 Mont. 276, 283 Pac. 213,* our court said:

> "Every intention of the parties to a deed is to be ascertained, if possible, from its language, not as it is presented in particular sentences or paragraphs, but according to its effect when viewed as an entirety. (Citing cases.) Moreover, where parties to a contract of doubtful or ambiguous meaning have placed a particular interpretation upon it, that interpretation is one of the best indications of their true intent." *(86 Mont. at 294)*

4. Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense, and the meaning must be proved.

13-711, R.C.M. 1947.

After recognizing that when the terms of a contract are clear and unambiguous the contract is not subject to interpretation and the language of the contract governs, the Montana court in *Lehrkind v. McDonnell, 51 Mont. 343, 153 Pac. 1012,* stated in part with respect to a contract which is ambiguous:

> " * * * but when it contains terms or expressions which are of doubtful import, the necessity for in-

terpretation arises. It is then incumbent upon the court to ascertain, by resort to proof of the attendant circumstances, as to what the mutual intention of the parties was at the time it was made. * * * Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense (Rev. Codes, sec. 5034); but a court cannot usually ascertain from the writing alone whether such an expression has a technical meaning, and, if so, what that meaning is, for it cannot take judicial notice of such matters. Nor may it take judicial notice that the parties intended to use it in that sense. Here a clear issue was presented as to the mutual intention of the parties in the use of the expression in question, and it was competent for the court to admit, as it did, evidence showing the circumstances under which the parties conducted and concluded their negotiations — not to contradict, enlarge or vary the terms of the written instrument, but to enable the jury to ascertain the mutual intention of the parties, and hence whether the plaintiff or the defendant was guilty of a breach of the contract."

(51 Mont. at 353)

5. Montana's Uniform Aeronautics Code defines some terms, but does not define "student", "student pilot", "student instruction", or "training program".

1-102, R.C.M. 1947.

Neither "Words & Phrases" nor any dictionary defines "training program". The opinion of the district court so notes. *(T1, Pp. 51-52)*

6. In the case of *Park Saddle Horse Company v. Royal Indemnity Company, 81 Mont. 99, 261 Pac. 880, 1927,* the original policy involved covered the trade or

business of the insured as an operator of saddle and pack horses in Glacier Park, Montana, and vicinity, and provided:

> "It is understood and agreed that the undermentioned policy is intended to apply and shall apply exclusively to liability as in the policy defined and limited, arising by reason of the maintenance and/or use of saddle and pack horses."

The trial court construed the policy by substituting in place of the words "by reason of the maintenance and/or use of saddle and pack horses" the words "out of assured's saddle and pack horse business". A party of four tourists engaged the plaintiff to conduct them as a saddle horse party on a two-days' trip over established mountain trails in the park. They were placed in the charge of a regular guide. The guide became lost. It was necessary for the tourists to dismount from their horses from time to time, and occasionally the guide directed them to dismount; and at one place, while dismounted at the direction of the guide, one of the ladies of the party in going over a steep mountainside on foot, where there was no path or trail and while she was using due care, slipped, caught her heel and fell, wrenching and twisting her knee and injuring her leg. The named insured was required to pay $1,000 for those injuries. He thereupon sued the liability insurer. The general principles which are still followed by our present Supreme Court with reference to the construction of insurance contracts are stated in the decision as follows:

"Contracts of insurance should be given a fair and reasonable construction such as intelligent business men would give them, rather than a strict or technical construction. It should be borne in mind that it is a cardinal principle of insurance law that a contract of insurance is to be construed liberally in favor of the insured and strictly as against the insurer. (32 C.J. 1152.) Whenever a contract of insurance is so drawn as to be ambiguous or uncertain, and to require construction, and the contract is fairly susceptible of two constructions, one favorable to the insured and the other favorable to the insurer, the one favorable to the insured will be adopted. (Citing cases.) It is also an established principle that in construing policies of this general character the words of the agreement are to be applied to the subject matter about which the parties are contracting at the time, the presumption being that the matter is in the minds of the parties when contracting. (Citing case.)" *(81 Mont. at 111)*

7. The most recent statement of the Montana rule which fully accords with the statement of the Ninth Circuit Court on rehearing in the *Eagle Star* case cited later on is found in *Holmstrom v. Mutual Benefit Health & Accident Association, September 18, 1961, Vol. 18, St. Rep. 355, 139 Mont. 426, 364 P. 2d 1065,* in which our Court said:

"In our judgment this sentence is not consistent with the more boldly printed portions of the policy previously noted. It is not only ambiguous but conflicting. Here the appellant insured a man of 43, and continued to take his premiums for said insurance for a period of 31 years during which time he had no reason to believe that he did not have a noncancellable policy. The time has passed when re-

sponsible insurance companies can hide, in the fine print, escape clauses that will leave responsible citizens uninsured in their senior years.

"*The policy holder must be protected against conflicting, confusing and ambiguous statements in policies* and whenever there are two constructions that can be placed upon a policy this court believes the better rule is to apply that construction most favorable to the policy holder." (Emphasis supplied)

8. In *Auto F. Corp. v. British, etc., Underwriters, 72 Mont. 69, 232 Pac. 198:*

"In view of the foregoing, we deem the interpretation of the words 'federal', 'state', and 'municipal', contended for by the defendants, too restrictive.

"If there is any uncertainty as to whether these terms are employed in their restricted signification so as to have reference solely to the United States or are used in an enlarged sense so as to include Canada, then that construction should be adopted which is beneficial to the insured (citing case), or, to state the rule applicable in language approved by this court:

" 'No rule in the interpretation of a policy is more fully established, or more imperative and controlling, than that which declares that in all cases it must be liberally construed in favor of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance was his object to insure.' (May on Insurance, sec. 175.) (Citing case.)" *(72 Mont. at 74)* (Followed by the language quoted in the opinion of the District Court at *T1, P. 47.)*

9. In *Johnson v. Continental Casualty Co., 1953, 127 Mont. 281, 263 P. 2d 551,* the Court said:

"Section C(a) of the insurance policy reads: 'Injuries coming within provisions of Section C of this part, are those sustained in consequence of: (a) The wrecking of any private pleasure type automobile or animal drawn vehicle within which the assured is driving or riding as a passenger, or the wrecking of any private commercial automobile, motor-driven car, truck, wagon or animal-drawn vehicle (excluding motorcycles and farm machinery) within which the insured is driving or riding and while being used for transporting merchandise for a business purpose (provided the insured is not operating any such vehicle while carrying passengers for hire), or being accidentally thrown from such automobile, car or vehicle while so riding or driving.'

"The determinative question on the appeal is whether a caterpillar tractor is a motor-driven car or truck within the meaning of the policy of insurance. The district court answered in the affirmative and we think correctly.

"In interpreting the policy of insurance the district court, as well as this court, shall resolve uncertainties and ambiguities in the policy against the insurer since it is responsible for the form of the contract. (Citing Montana authority.) When the contract is so interpreted we are led to the conclusion reached by the trial court.

"The contract used the terms 'private commercial automobile', and 'truck' and it is evident that by the use of the all-inclusive term 'motor-driven car' the parties intended something more than what is usually denominated an automobile or a truck. This is further evidenced by the clause '(excluding motorcycles and farm machinery)'. The only reasonable excuse for this exclusion clause is that without it the parties intended that motorcycles and all forms of motor-driven farm machinery would be included

within the comprehensive classification of 'motor-driven cars (or) trucks.' *Had defendant desired to exclude any other motor-driven vehicle than motorcycles and farm machinery it should have done so expressly.*" (Emphasis supplied; *127 Mont. at 282.)*

10. In *Keating v. Universal Underwriters, 1958, 133 Mont. 89, 320 P. 2d 351,* defendant insurer issued to plaintiff insured a garage liability policy whereby defendant agreed by Coverage D:

> " 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property of others of a kind customarily left in charge by garages, including the loss of use thereof, caused by accidental collision or upset of such property while in charge of the named insured in connection with his automobile dealer, repair shop, service station, storage garage or public working place operations.' But defendant provided for a number of exclusions from this coverage, two of such exclusions being:
>
> " '(a) to liability assumed by the insured under any contract or agreement except a warranty of goods or products;'
>
> " '(h) under coverage D, to injury or destruction caused directly by fire or theft; or to injury or destruction of (1) property owned or loaned or rented to the named insured, or (2) automobiles being driven or transported from the factory or other wholesale distributing point to the purchaser or for storage.' " *(133 Mont. at 91)*

Plaintiff insured had an automobile in the garage under a trust receipt to General Motors which he stored, demonstrated, and attempted to sell during the course of

which it was wrecked. General Motors demanded payment, defendant denied coverage. The Court said:

> "Thus, the ultimate questions are whether the insured is responsible to General Motors Acceptance Corporation, independently of contractual liability, for loss of the car within the meaning of the insuring clause, 'To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property of others of a kind customarily left in charge of garages * * * caused by accidental collission or upset of such property while in charge of the named insured in connection with his automobile dealer * * * operations;' and whether the automobile was 'property owned' by plaintiff within the meaning of the exclusion clause of the insurance policy."
> *(133 Mont. at 93)*

The Court discussed the arguments of counsel concerning the relationship between General Motors and plaintiff insured, and then said:

> "Whichever may be the correct position, it appears that all of the cases cited as supporting one or the other involve creditors of or buyers from the trustee and some miscellaneous situations, and none of the cases cited, or which we have been able to discover, involve the first problem here posed, that is, whether or not the car was the 'property of others' or 'owned (by) the named insured' within the meaning of those phrases as employed in the insurance policy.
>
> "It has been held that the term 'owner', when used alone, imports an absolute owner or one who has complete dominion over the property owned as the owner in fee of real property, (citing case), and that the words 'owned by' mean an absolute and unqualified title, (citing case). Whether such is the

meaning of the phrases here in question, or if the meaning is varied according to the connection in which they are used, and they are to be understood according to the subject matter to which they relate, (citing case), it is certain, from the defendant's viewpoint alone, the phrases are at best generic and general and not specific and hence ambiguous and uncertain. *The phrases are not defined in the insurance policy, nor is there any phraseology or conditions therein, nor is there anything in the facts submitted to this court from which may be inferred any qualified meaning,* (Emphasis supplied) and, standing alone, we cannot say that these phrases were intended to exclude from the insurance coverage property possessed for sale only and to which the legal title resides in another, even though it be for security purposes alone.

" * * * *If the defendant insurer had intended to exclude 'floored' automobiles from coverage, it would have been a simple matter for the insurer to have clearly and unequivocally provided therefor by the simple expedient of specifically referring to trust receipts and floor plans in the exclusion clause thereby removing all doubt.* (Emphasis supplied) The law is plain that the ambiguity and uncertainty caused by the phrases in question must be resolved in favor of the plaintiff insured and against the defendant insurer. (Citing and quoting Johnson v. Continental Casualty Co., and Montana Auto Finance Corp. v. British Etc. Underwriters.)"

(133 Mont. at 95-96)

In this case, appellant was required by Montana law to define in plain, simple, unambiguous language the words "student", "student pilot", "student instruction", or "training program", if appellant desired some specific application of those terms. If not defined clearly in the

policy, appellant had the burden of proving by a preponderance of the evidence the intent and meaning appellant urges, which was not done in this case. The only evidence available to the trial court was the evidence from Clark.

If the appellant intended that Al Forhart, and Al Forhart alone, was an insured under its policy, it was required by Montana law to expressly so state in plain, simple, unambiguous language. If the words "training program" included solo flight instruction to a single, private pilot, appellant was required to so state in plain, simple, unambiguous language. How extremely simple and easy it would have been to state in its contract:

a. "Al Forhart, and Al Forhart alone, is the only person insured under this contract;" or

b. "The term 'the insured' does not include student pilots. Student pilots are not covered by this policy."; or

c. "The words 'the training program' mean any form of student instruction."; or "Students engaged in any form of student instruction are engaged in a training program."

Having failed to do so, and having failed to prove otherwise by competent evidence, appellant is bound by the reasonable construction adopted by the District Court.

In this connection, neither the general dictionary, nor the law dictionary, nor Words & Phrases, defines "training program". The policy and the application do not define what is contemplated by the words "training program". The only evidence concerning the mean-

ing and intent of the words "training program" is from Clark. He stated that he was never engaged in any "training program" with Al Forhart, and there never was any "training program" as Clark understood the words "training program" to mean *(T1, P. 39)*. Although appellant had the burden of proof, there is no other testimony, and no other evidence, to contradict, dispute, or explain this statement by Clark. Did it contemplate federal and state training programs such as the Civilian Pilot Training Program under the Civil Air Patrol Act *(Title 36 USCA, Section 202, etc.);* or under the civilian schools and programs auxiliary to the promulgation of the expansion of aviation in general, *Title 10, USCA, §§ 9305, 9384, 9411-9413, 9441*; or the training programs financed under the G. I. Bill under contracts with the Veteran's Administration such as were considered in the *Petro* case discussed in the opinion of the District Judge; or state university flying schools such as were involved in *LeBlanc v. American Employers, La.,* cited hereafter; or civilian cadet schools? The words "training program" certainly do not contemplate nor connote the personalized, individual dual and solo instruction and certification of Wayne Clark by Al Forhart.

Furthermore, if "student instruction" and "training program" are synonymous terms, as urged by appellant, why did appellant insert in the application by typewriter that coverage was desired "while aircraft being

operated by student pilots"; in box (f) of Item 6 of the Declarations that the term "Special Uses" is defined as "STUDENT INSTRUCTION"; in Item 7 of the Declarations that the aircraft would be used for purposes of student instruction, by student pilots under supervision and control of an instructor pilot, with no limitation as to identity of pilots. Why an omnibus clause? Why a severability of interests clause? Why an exclusion for use by pilots not contemplated by Item 7? Why pay the hull loss so excluded if Clark was not a pilot contemplated by Item 7? Why insert by typewriter a restriction that only Forhart was insured while transporting passengers for hire if it was intended that Forhart was the only insured for any and all flying uses or purposes? Appellant does not explain the ambiguities and conflicts between the fine print clauses, not to mention the conflict between fine print clauses and typewritten inserts, all promulgated by appellant or its soliciting agent.

B. *APPELLANT'S AUTHORITIES.*

Without citation of authority, appellant states that the rules of construction laid down by the Montana Court are not applicable to third parties (*App. Br., P. 19*). Omnibus insureds are not in a class of third party strangers; and are in fact "insureds" entitled to a proper construction:

> "An omnibus clause creates liability insurance not only for the benefit of the named insured, but also

> for the benefit of those who come under the clause and meet its requirements; or, in other words, it does not afford additional protection to the owner, but extends protection to third persons operating the vehicle with the insured's consent. An additional insured need not have an independent insurable interest to come within the protection of the omnibus clause. Of course, the necessary relationship between the additional insured and the owner must appear in order to bring such person within the protection of the contract. And, an endorsement added to a policy containing such a clause modifies the terms of the original policy to that extent. The construction of liability or nonliability is not determined solely by the law of principal and agent.
>
> "Protection then vests in the additional insured to the same extent as if he were the named insured and had been driving. The coverage itself is not enlarged, merely the persons insured being thereby increased in number * * *."
>
> *(Vol. 7, Appleman, P. 243, §4354)*

The "Severability of Interests" clause in the Conditions *(Par. 5)* provides that the term "the Insured" is used severally and not collectively.

The cases cited by appellant, all from other jurisdictions, are actually consistent with the foregoing Montana decisions. We have no quarrel with the results in those cases cited by appellant under the facts they considered. For example, in *Farm Bureau Ins. Co. v. Daniel, 4th C.C., 104 F. 2d 477,* cited by appellant, use of the truck for purposes of a garage business was not provided in the declarations. The Court refused to use the omnibus clause, defining persons insured, to extend or

broaden the uses defined in the declarations. We have no quarrel with that view. In our case, the Declarations typed in by appellant spelled out that special uses of the craft would include student instruction, and by student pilots. Appellant would have this Court take an isolated, printed term from the omnibus clause — training program (which is not defined in application, policy, or dictionary and concerning which appellant submitted no evidence despite appellant's burden of proof), reject the fact determination by the trial court which is based upon the only evidence in the record, the evidence from Clark, and destroy or eliminate the uses expressly authorized by appellant in the declarations inserted by appellant by typewriter. Appellant asks this Court to do essentially what the 4th Circuit refused to do in the *Farm Bureau* case, use the omnibus clause to modify the uses provided for in the declarations, and goes still further in asking this Court to substitute appellant's discretion based on no evidence, for the trial court's discretion based on the only evidence.

Standard Surety & Casualty Co. v. Maryland Cas. Co., N.Y., 119 N.Y.S. 2d 795, is cited by appellant. We do not quarrel with this decision. Coverage A in the declarations provided the insurer agreed to pay on behalf of the insured damages for injuries sustained by any person. The Exclusions categorically provided:

"This policy does not apply: * * *

(d) Under Coverage A to bodily injury to * * * any employee of the insured * * *."

The injured claimant was an employee of the insured on business of the insured while hurt. The Court properly held there was no coverage.

Lambert v. New England Fire Ins. Co., Maine, 90 A. 2d 451, likewise simply gives effect to a clearly expressed exclusion clause.

Massachusetts Mutual Life Ins. Co. v. Pistolesi, Cal., 9th C.C., 160 F. 2d 668, accords with Montana law. "Training program" is not defined in any dictionary, nor in "Words & Phrases". Under Montana law appellant had the burden of proving its meaning.

We cannot see why appellant cites *Insurance Co. of North America v. General Aviation Sup. Co., 8th C.C., 283 F. 2d 590.* The lower court because of ambiguities and conflicts in the policy held coverage as did the lower court in this case. In affirming, the Eighth Circuit Court said in part:

> "The insurance company relies on the evidence that the plaintiff, in carrying on its business of selling supplies to persons and to organizations that sell, service, and repair or use aircraft constantly refers in its extensive catalogue, merchandise descriptions, and sales talks to what it calls the 'aviation industry,' and 'aviation trade' and 'aviation business.' The contention is in substance that the word aviation ought to be given the same meaning in the question policy phrase as it has when so combined with the words 'industry,' or 'trade,' or 'business,' as if the phrase read to exclude 'sales organizations in the aviation industry,' 'service organization in that industry, etc.'

> "But there was no evidence that the policy phrase 'aviation sales organization,' etc., was ever used to define the plaintiff's business. It appears to have been coined by the insurer's scrivener and there is no definition of the phrase in the policy. Having affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the company to define the exclusions from that promise in clear terms. There is at least ambiguity here, whether the policy's intention is to exclude organizations like the named insured which sell, service and repair aircraft, or whether it is more broadly meant to exclude also organizations like the plaintiff which do none of those things, but do sell supplies and equipment." *(P. 592)*

The burden is upon appellant to demonstrate error. To obtain a reversal appellant must show the conclusion reached by the trial court is irrational, illogical, unsound or contrary to any local or general law applicable to the interpretation of an insurance contract *(258 F. 2d at 592-593)*. Appellant cannot point to any evidence or to any local law so indicating. The evidence and the local law suggest otherwise. We can adopt the concluding sentence from the 8th C.C. opinion:

> "We conclude that the decision of the trial court on the point in issue here was a permissible one under local law." *(258 F.2d at 593)*

None of the cases cited by appellant differ from the views of the Montana Supreme Court, nor do they support in any way an argument that the District Judge in this case was in error in his findings of fact, conclusions of law, or opinion.

C. *CASES FROM OTHER JURISDICTIONS.*

1. *United States v. Eagle Star Ins. Co., 9th C.C., Wash., 196 F. 2d 317, reversed 201 F. 2d 764;*
2. *Prudential Insurance Company of America v. Barnes, Ariz., 9th C.C., Dec. 21, 1960, 285 F. 2d 299;*
3. *Petro v. Ohio Cas. Ins. Co., D.C., Calif., 95 F. Supp. 59;*
4. *Fireman's Fund Insurance Company v. McDaniel, 187 F. Supp. 614,* opinion affirmed and adopted, *5th C.C., 289 F. 2d 926;*
5. *Ins. Co. of No. Amer. v. General Aviation, 8th C.C., 283 F. 2d 590;*
6. *Hall's Aero Spraying v. Underwriters of Lloyd's London, 1960, 5th C.C., 274 F. 2d 527;*
7. *Great American Indemnity Co. v. Sultman, 8th C.C., 213 F. 2d 743, cert. den. 348 U.S. 862;*
8. *Thompson v. Ezzell, Wash., 1963, 379 P. 2d 983;*
9. *Steven v. Fidelity and Casualty Co. of New York, Sup. Ct. in Banc, Calif., 1963, 377 P. 2d 284;*
10. *Butche v. The Ohio Casualty Ins. Co., 1962, Sup. Ct., Ohio, 187 N.E. 2d 20;*
11. *Continental Cas. Co. v. Warren, Texas, Sup. Ct., 1953, 254 S.W. 2d 762;*
12. *48 A.L.R. 2d 704,* and *9 A.L.R. 2d 581.*

D. *ESTOPPEL.*

It should not be necessary in this case to utilize the doctrines of reformation or estoppel to give effect to the intent of the parties, or to bar appellant from denying

the intent. There is ample uncontradicted evidence to utilize the reformation or estoppel under the Montana cases.

With respect to estoppel, there are the following cases:

Curtis v. Zurich, 108 Mont. 275, 89 P. 2d 1038;

Stevens v. Equity Mutual Fire Insurance Company, 66 Mont. 461, 213 Pac. 1110;

Baker v. Union Assurance Society of London, Limited, 81 Mont. 281, 264 Pac. 132;

Thielbar Realties, Inc. v. National Union Fire Insurance Company, 91 Mont. 525, 9 P. 2d 469;

McGaffick v. Ligland, 130 Mont. 332 at 353, 303 P. 2d 247;

Lindblom v. Employers Liability Assurance Corporation, 88 Mont. 488, 295 Pac. 1007.

CONCLUSION

Appellant had the burden of proving its claims to the trial court by a preponderance of the evidence. The findings and conclusions of the trial court are based upon the only evidence in the record, all of which is uncontradicted, undisputed, unexplained. Appellant urges the trial court was in error because it did not arrive at different findings and conclusions, but fails to point to any evidence to warrant different findings and conclusions. It fails to do so because there is no other evidence in the record, because appellant wholly failed to produce any evidence to the contrary. The findings and conclusions of the trial court are the only logical

results when the evidence is weighed and considered in light of Montana statutes and case decisions.

A convincing and compelling construction of the policy as written affords coverage to Wayne Clark and his employer, Lew Chevrolet Co., as omnibus insureds. If there is any doubt arising out of one of the most ambiguous and uncertain contracts these appellees have ever examined, that doubt is wholly and completely resolved when we refer to the additional evidence offered by appellant, and admitted without objection — the undisputed oral negotiations, and the undisputed documentary exhibits. The evidence of an intent to extend coverage to the omnibus insureds is overwhelming.

The findings of fact and conclusions by the trial Judge are rational and reasonable, and are supported by ample, competent, substantial evidence worthy of belief. Neither reformation of the contract, nor estoppel to deny the intent of the contract, should be required. If deemed necessary, however, there is ample uncontradicted evidence to compel either one or the other under Montana law.

Respectfully submitted,

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance wtih those rules.

CALE CROWLEY
One of the Attorneys for Appellees.